



IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 3RD DAY OF APRIL 1998

BEFORE

THE HON'BLE MR.JUSTICE T.N.VALLINAYAGAM

R.S.A.No.71/1995

Between;

Mahaboob Saheb,  
S/o Murtuza Saheb Nazeer,  
Alias Peerjade, major,  
R/o Mirde Galli, Bijapur.

Since deceased by his LRs.

- 1.a) Chanbee  
W/o Mahaboob Saheb,  
Aged about 65 years.
- 1.b) Saheblal,  
S/o Mehboob Saheb  
aged about 50 years,
- 1.c) Nazeer Ahamed  
S/o Mehboob Saheb  
Aged about: 45 years,
- 1.d) Muntaz  
W/o Abubekar Rozindar  
Aged about 40 years,
- 1.e) Sanoor,  
S/o Mehboob Saheb  
Aged about 35 years,
- 1.f) Ishaque  
S/o Mehboob Saheb,  
Aged about 30 years,
- 1.g) Waheed  
S/o Mehboob Saheb  
Aged about 28 years

1.h) Gulam  
S/o Mehboob Saheb  
Aged about 25 years.

1.i) Yusuf  
S/o Mehboob Saheb  
Aged about 22 years. ..Appellants.

All are r/at Mirder Galli,  
Bijapur.

(By Sri.S.M.Byadgi, adv)

And;

1. Sri.Jagadish,  
S/o Damodardas Darbar,  
major, R/o Bombay,  
R/by his G.P.A Holder,  
Sri.Atulkumar,  
S/o.Damodardas Darbar,  
major, Gujjargalli,  
Bijapur.

2. Sri.Maktum Saheb  
S/o.Dastagir Saheb,  
Attar, major,  
R/o.Mirde Galli,  
Bijapur. ..Respondents.

(By Sri.S.M.Arabatti, adv)

This R.S.A is filed under Sec.100 of  
CPC, against the judgment and decree dt 5.12.94  
passed in R.A.No.26/85 on the file of the II  
Addl. Dist.Judge, Bijapur, dismissing the  
appeal and confirming the judgment and decree  
passed by the Addl.Civil Judge, Bijapur, in  
O.S.No.28/82 dt 20.11.85.

This R.S.A coming on for pronouncement  
of judgment this day, the court delivered the  
following:-

J U D G M E N T

The first defendant is the appellant. The suit for possession was decreed by both the courts and that decree rendered on the concurrent finding and the decree are in attack in this second appeal by the first defendant.

2. The plaintiff is the owner of CTS Nos.928 and 929 situated at Ward No.IV of Bijapur City. The defendant is residing in the said property for the last more than 40 years. The defendant claim that the plaintiff agreed to sell the property for a consideration in January 1975 and the agreement must have been ended in a sale deed by March 1978. In the mean time the suit in O.S.No.46/78 was filed for possession by the plaintiff on the ground that the contract has been cancelled. The suit was dismissed on the ground that the contract was still subsisting and the same was not duly

cancelled. Now the present suit is filed on the ground that the defendant has lost his right to enforce the contract of sale, Even if it is true, consequential possession thereof. The courts below came to the conclusion that the defendant has lost his right and consequently decreed the suit.

3. It is contended before me that the suit for possession is not maintainable in view of the Full Bench decision of this court wherein a protection under Sec.53A is granted to the agreement holder. But this aspect was countered by the learned counsel for the respondent by pointing out that there is admittedly no agreement of sale in writing to avail benefit of Sec.53A. A passage in Mulla Transfer of Property Act which is to the following effect.

" If the agreement is void under any other law, neither the second nor the doctrine of equity on which it is founded will validate that which the law says is invalid. This proposition follows from the decisions of the Privy Council in Ariff Vs. Jadunath (c) 131 I.A.762 and Mian Pir Bux V. Sardar Mahomed Tahar (d) 64 I.A.388

and is illustrated by a privy Council decision from Ceylon in which the Judicial Committee declined to apply the equity to a Partnership agreement which was not executed or attested as required by law."

Another comment on Sengupta also was commented relying on the dictum of the Patna High Court in the following fashion; (T.P Act Mulla 7th Edn)

" As has been noted, the second only applies to a case where there is a written agreement. An oral agreement will not be sufficient. This is a departure from the English law, for the doctrine is applied in England to parole contracts affecting land which are not enforceable on account of the Statute of Frauds. There seem to be two reasons for this limitation: (1) the occasion for the doctrine arises in India with reference to documents inadmissible in evidence for want of registration and (2) the risk of perjuries if an oral contract could be set up as a defence after limitation for a suit for specific performance had expired."

T.P.ACT Sengupta (16th Edn)

" Under the present section, the doctrine can be applied only

when there is a written document from which the terms of the contract can be ascertained with reasonable certainty."

4. As against this submission made by the learned counsel for the appellant if there is something available in writing then the contract can be presumed. Reliance was placed upon Maneklal Mansukhbhai vs. Hormusji Jamshedji Ginwalla and Sons in AIR (37) 1050 SC 1 to the following effect;

" A formal lease is not necessary to attract the application of S.53A. All that is required is that an agreement in writing signed by the transferor can be gathered from the evidence."

But this Supreme Court decision is for the presumption that if there is an agreement in writing and the same is not produced then inference can be drawn about the existence of such an agreement under the terms thereof. Therefore, this does not apply to the facts of this case.

5. The next point argued by the learned counsel for the appellant is that there is resjudicata that operates against the plaintiff. Therefore, he relied upon two dictums of the Supreme Court in AIR 1954 SC 82 (SUNDERABAI w/o DEVRAO DESHPANDE AND ANOTHER vs. DEVAJI SHANKAR DESHPANDE) to the following effect,

"Where the right claimed in both suits is the same the subsequent suit would be barred as res judicata though the right in the subsequent suit is sought to be established on a ground different from that in the former suit. It would be only in those cases where the rights claimed in the two suits were different that the subsequent suit would not be barred as res judicata even though the property was identical."

and in AIR 1986 SC 391 ( FORWARD CONSTRUCTION CO. and OTHERS, vs. PRABHAT MANDAL (Regd) ANDHERI AND OTHERS) to the following effect;

" S.11 in view of Expln. VI applies to public interest litigation as well but it must be proved that the previous litigation was the public interest litigation not by way of a private

*Dr.*

grievance. It has to be a bonafide litigation in respect of a right which is common and is agitated in common with others. The onus of proving the want of bonafides in respect of the previous litigation is on the party seeking to avoid the decision."

But the question of res judicata will not apply to the facts of this case because the contract has been cancelled. Therefore, the finding rendered in the earlier suit cannot be held as res judicata in the present suit.

6. The courts below have rendered finding of fact that the plaintiff is entitled to the relief of possession. There is absolutely nothing to show that the finding rendered is wrong nor could be set aside on any other grounds mentioned in the memorandaum of grounds or the grounds argued before me. Holding that there is no merit, the second appeal is dismissed. The amount said to have paid by the defendant to the



plaintiff is said to have been deposited  
in the court. It is open to the defendant  
to collect the same.

Sd/-  
JUDGE

mv/-